1955

J. Hensley Cottrell v. Grand Union Tea Co. and C. E. Pope : Brief of Respondents

Utah Supreme Court

Critchlow, Watson & Warnock; Counsel for Respondents;

Case No. 8396

IN THE SUPREME COURT
of the
STATE OF UTAH

J. HENSLEY COTTRELL,
Plaintiff and Appellant,

— vs. —

GRAND UNION TEA COMPANY, a corporation, and C. E. POPE,
Defendants and Respondents.

BRIEF OF RESPONDENTS

CRITCHLOW, WATSON & WARNOCK
Counsel for Respondents

1320 Continental Bank Building
Salt Lake City, Utah

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TEXTS

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BRIEF OF RESPONDENTS

I. AMPLIFYING PLAINTIFF'S STATEMENT OF FACTS

Since the vital issue in this action is whether the Findings of Fact and Judgment (R 229-230) are supported by the evidence the defendants desire to set out in some detail the evidence bearing on the issue of a full disclosure to Salt Lake County Attorney of all the material facts bearing on the prosecution of the criminal action of embezzlement against the plaintiff.

This evidence was given in the testimony of defendant, C. E. Pope, called as the first witness by the plaintiff, and Hal Taylor, Deputy County Attorney, and Bernard N. Fives, witness for the defendants.

Mr. Pope testified that in the latter part of November or first part of December, 1953, he contacted Mr. Hal Taylor in the County Attorney's office (R 16 and 17) and furnished documents and gave information to Mr. Taylor regarding any violation of the criminal laws by the plaintiff, Mr. Cottrell.

On the first meeting with the County Attorney, Mr. Pope, who was then accompanied by Mr. Fives, spent approximately one hour's time explaining the shortage in plaintiff's account and left documents herein designated as Exhibits 2, 3 and 5 with Mr. Taylor and also showed a number of supporting documents to him (R 17 and 18). Exhibit 2 is the Remittance Report made out by plaintiff in his own hand writing showing a shortage of approximately $70.00; Exhibit 3, Auditor's Report and Exhibit 5 is a summary of figures furnished to defendants by plaintiff, (R 19 and 20).

Mr. Pope stated that in this conversation he gave Mr. Taylor a full resume as to his company's set-up and operations as it affected plaintiff's employment with it, (R 22).

After this discussion, Mr. Taylor wanted a copy of the contract of employment of the plaintiff, Exhibit 1, and the cash bond furnished by plaintiff, Exhibit 4, (R 23).

These documents were taken to Mr. Taylor some three or four days later and a further conversation took place for about an hour in which a full explanation was made of Exhibits 1 and 4, (R 24). Mr. Pope also told Mr. Taylor that plaintiff was required to abide by the contract, (R 25), and that he (Pope) had been told by Mr. Fives that Mr. Cottrell had been visited twice by Mr. Fives, but just when these visits were made he did not know.

On this second visit, after Mr. Taylor had received all the documents and reviewed the evidence, he advised Mr. Pope that there was probable cause that the plaintiff was guilty of embezzlement and prepared the criminal complaint charging embezzlement, which was signed by Pope, (R 31).

Mr. G. Hal Taylor, Deputy County Attorney, testified that he was now engaged in the private practice of the law, but that in the latter part of 1953 he was a deputy in the office of Salt Lake County Attorney, (R 139).

He testified that he recalled the visit of Mr. Pope to the county attorney's office, but was not sure as to the date after the period of time between then and the

date of the trial. He recalled that on Mr. Pope's first visit with him he was accompanied by Mr. B. W. Fives, (R 140-141). He remembered seeing and studying documents, particularly exhibits 2, 3 and 5, and discussing the matter of plaintiff's shortage with the defendant company for some time in order that he might get all the facts, (R 142).

He stated that Mr. Pope showed him sustaining documents to the above stated exhibits and that he desired further information and documents and that later, Mr. Pope returned, this time alone, bringing further documents, including the contract and cash bond Exhibits 1 and 4, (R 143).

After reviewing all documents and discussing the situation thoroughly on these two occasions, Mr. Taylor testified as follows, (R 143) by Mr. Watson:

"Q. Would you state what your conclusion was, and what your advice to Mr. Pope was?

A. I was of the opinion, based on the information submitted to me, that there was probable cause to believe that Mr. Cottrell was guilty of embezzlement; and at that time I prepared the papers in a complaint charging embezzlement and also filed—

Q. You so advised Mr. Pope of that?

A. I advised him that was my opinion, yes.

Q. Then you prepared the complaint, and it was signed by Mr. Pope?

A. That is my recollection, yes.

Q. Do you recall, in the conversation that you had, whether mention was made by either Mr. Pope or Mr. Fives, that Mr. Cottrell had reported to the Grand Union Company that he had lost his purse, containing some of the cash that he had collected on the route?

A. I have discussed that matter subsequently, and I don't have a recollection as to when that information was given to me or by whom. I do recall that somewhere in the proceedings the information came to me, that Mr. Cottrell made the claim that he had lost the money. When, I don't know.

Q. Do you recall what your reply was to that, as to what effect that would have, if any?

A. At the time of the discussion we had Exhibit 2, which indicated that certain checks had been remitted, and cash had not, and I was of the opinion that, in view of that, there was sufficient evidence to go to the jury on the question as to whether the money was lost, or not, and that it would be an affirmative defense, and did not change my mind in regard to the filing of the complaint.

Q. That is, that would be a defense the plaintiff himself would have to set up?

A. Yes."

Then on cross-examination by Mr King, Mr. Taylor stated that he desired to see and study the contract and other documents to obtain all the information possible and determine from the contract that a truster-trustee relationship existed between Mr. Cottrell and Grand Union Company, (R 148), and that the money which Mr.

Cottrell had belonged not to him, but to Grand Union Company. He testified that there was some variance in practice between the exact terms of the contract and the way it was handled which was that the company permitted the route salesman, (Mr. Cottrell) to deduct his expenses and some other items, rather than remitting the gross, (R 150).

Mr. Taylor's Testimony in direct and cross-examination summarized shows that on the two visits to him by Mr. Pope, accompanied the first time by Mr. Fives, that all the documents pertaining to the embezzlement were furnished and that full explanation of the entire arrangement of plaintiff's employment was made prior to the issuance of the criminal complaint with the one exception that Mr. Taylor does not recall for sure that Mr. Cottrell sometimes remitted amounts owing to the company by checks, vouchers or money orders. Mr. Taylor was of the opinion that there was probably cause to believe the offense had been committed by Mr. Cottrell and he so advised Mr. Pope to that effect and upon that advise, Mr. Pope signed said complaint, (R 155-156). After thus testifying, to question by the Court relative to how Mr. Taylor determined the amount of the shortage, the following testimony was given starting at line 7 of page 158 of the record:

"BY THE COURT:

Q. Then there is a true amount that was either embezzled, or not embezzled. Now, how did you determine what the true amount was?

If there is only one offense and there has been one embezzlement, that must have been a definite amount.

A. From the yellow sheet. I believe it is Exhibit 2.

Q. Did you rely upon that as the basis of the amount of the alleged embezzlement?

A. Yes.

Q. And that is an amount less than a hundred dollars, is that right?

A. Yes, it is $70.00, as I recall.

Q. You had Exhibit 2, or whatever the bond is, before you at the time you were making this determination, is that so?

A. I did, yes.

Q. What was the understanding that you had from the information furnished you, and an examination of that document, as to what it was, and what effect it had upon your problem?

A. I concluded, finally, it had no effect on it; that the money was taken out to protect the company against shortages either of inadvertence or of embezzlement.

Q. It wasn't merely an indemnity bond; it wasn't presented to you in that fashion, in any way. It was an actual deposit of cash with the company, cash belonging to the employee. You knew that?

A. Yes. I think that is the effect of the bond form.

Q. And you were aware that Mr. Cottrell had on deposit $80.00 at that time. Were you informed of that fact?

A. I don't recall the amount. I know that there was an amount on deposit, but I didn't—

Q. Did they tell you the amount?

A. As I recall, they did.

Q. Assuming, then, that amount was $80.00, was it your opinion, and did you advise them the crime of embezzlement had been committed, if Mr. Cottrell were short $74.00, and he had on deposit $80.00 there, and the employment had been terminated?

A. I don't remember stating it just that way, or discussing it that way.

Q. I am trying to determine what information they gave you that led you to the conclusion that the crime had been committed?

A. Well, I think my thinking about it was, your Honor, that there was—I had discussed it—we generally discussed it in the office—that the posting of the bond in the form that it was posted, did not excuse or could it be offset against the taking of funds that, under the terms of the contract, he was still the custodian. He was still required to remit to the company the amounts he collected, and then, if there were an eventual shortage, after he had remitted to the company, that the company could go against the bond to protect themselves.

But, I didn't think that Mr. Cottrell could offset the moneys he collected under the terms of his contract against the bond. And, to that

extent, and for that reason I didn't consider the amount of the bond particularly important, and don't recall exactly what the amounts were. But I do recall we had a discussion about them, and I knew he had an amount of money on deposit.

I made no attempt to do a mathematical calculation and deduct the amount of the bond from the $70.00, or from whatever was missing. I took the view that the amount which was not turned in on the date indicated on Exhibit 2, that there was probable cause to believe that he had embezzled that amount.

Q. Did you understand that the amount that was reflected on Exhibit 2 was the final accounting, as far as the employee went with the company, and that there were no further transactions after that?

A. I recall they told me they were going to let him go, or had let him go prior to the time.

Q. You were aware of the termination date?

A. Yes, I was aware of it.

Q. Mr. Taylor, it was your considered opinion the crime of embezzlement has been committed by a person, who, under these circumstances, does not remit the sum of $70.00, and that is the final transaction, at such time as the company is holding in trust for him $80.00; and you so advised Mr. Pope?

A. That must necessarily be the conclusion. I don't know whether I advised him of the matter. I finally concluded and consented to file the complaint that was filed, and I had that information."

Again the court at (R. 163) inquired and the witness testified as follows:

> "THE COURT: You said at the preliminary hearing you became convinced that your proof would fail. Can you elaborate on that. What didn't you have available at the time of that hearing, that you had at the time you determined there was probable cause; or what made you change your mind?
>
> A. Well, the amounts collected were collected in small dollar and a half, two dollars, three dollars, four dollars, and so on, and I felt even at the time of the preliminary hearing, that there was still probable cause, but I also felt that supporting evidence would have to be presented, to get a conviction, and it would probably be necessary to call in some seventy witnesses who had actually paid the money to Mr. Cottrell, and then show a total shortage, before this document would be admissible.
>
> I took the view that this document, Exhibit 2, was probably in the nature of a confession, and that under the criminal law it would be necessary for the State to establish the corpus delecti, or, that is, the fact that the crime had been committed, before this document would become admissible."

Mr. B. W. Fives testified that he had called upon and found Mr. Cottrell at home on two occasions. The first time, about November 15, 1953, Mrs. Cottrell was also home, but in-as-much as Mr. Fives did not have the records with him he was asked to come back at a later

date, (R. 174). On the second visit, about December 4, 1953, Mr. Cottrell was home alone and he refused to discuss the matter of his shortage with Mr. Fives for the reason that Mrs. Cottrell was not home although the copies of documents were in Mr. Cottrell's files in his home, (R. 176 to 178).

Mr. Fives in company with Mr. Pope called on Mr. Taylor at the County Attorney's office, he thought about December 15. That at that time Mr. Pope had an envelope full of documents which were reviewed by and some of them left with Mr. Taylor and he listened some to a lengthy conversation between Mr. Pope and Mr. Taylor following which Mr. Taylor asked Mr. Pope if he had some further records, to which Mr. Pope replied he had, and that he would make them available to Mr. Taylor, (R. 179). He then discussed with Mr. Taylor his visits with Mr. Cottrell and what the amount of the shortage would need to be for different offenses of embezzlement, (R. 180).

In his testimony in cross-examination he testified he was not sure of the dates that he called upon Mr. Taylor, but thought it was December 7, that he went there with Mr. Pope, he thought, sometime after December 4, (R. 183), and he stated that he heard discussion between Mr. Taylor and Mr. Pope for the furnishing of additional records and that Mr. Pope was to bring those at a later date and that the complaint was not signed at the time of the visit he attended, (R. 186-187).

STATEMENT OF POINTS

POINT I.

THE EVIDENCE ESTABLISHES THAT DEFENDANTS ACTED HONESTLY AND IN GOOD FAITH AND MADE A FULL AND FAIR DISCLOSURE OF ALL MATERIAL FACTS KNOWN TO THEM CONCERNING THE VIOLATION OF CRIMINAL LAW BY PLAINTIFF TO SALT LAKE COUNTY ATTORNEY, AND THAT DEFENDANT POPE ACTED ON ADVICE OF SAID ATTORNEY IN SIGNING THE COMPLAINT.

(a) ALL OF THE EVIDENCE WAS PRESENTED PRIOR TO ISSUANCE AND SIGNING OF COMPLAINT CHARGING EMBEZZLEMENT.

(b) PROBABLE CAUSE IS DETERMINABLE BY THE COURT AS A MATTER OF LAW WHERE EVIDENCE IS CLEAR AND UNCONTRADICTED.

POINT II.

PLAINTIFF'S CASH BOND COULD NOT BE SET OFF AGAINST SHORTAGE IN HIS ACCOUNT.

ARGUMENT

POINT I.

THE EVIDENCE ESTABLISHES THAT DEFENDANTS ACTED HONESTLY AND IN GOOD FAITH AND MADE A FULL AND FAIR DISCLOSURE OF ALL MATERIAL FACTS KNOWN TO THEM CONCERNING THE VIOLATION OF CRIMINAL LAW BY PLAINTIFF TO SALT LAKE COUNTY ATTORNEY, AND THAT DEFENDANT POPE ACTED ON ADVICE OF SAID ATTORNEY IN SIGNING THE COMPLAINT.

(a) ALL OF THE EVIDENCE WAS PRESENTED PRIOR TO ISSUANCE AND SIGNING OF COMPLAINT CHARGING EMBEZZLEMENT.

(b) PROBABLE CAUSE IS DETERMINABLE BY THE COURT AS A MATTER OF LAW WHERE EVIDENCE IS CLEAR AND UNCONTRADICTED.

The detailed statement of facts herein given by defendants establishes that the evidence is clear, concise and undisputed that defendant Pope, as the local manager of defendant Grand Union Company, honestly and in good faith made a full, fair and honest disclosure of all the material facts known to him to Mr. Taylor, Deputy County Attorney. Mr. Taylor's testimony is likewise definite, clear and undisputed that Mr. Pope furnished all documents required, and made full explanation of all transactions between plaintiff and defendant Company, prior to his determination that there was probable cause to believe that Mr. Cottrell was guilty of the crime of embezzlement and his advice to Mr. Pope to this effect and the preparing of the complaint and having it signed by Mr. Pope. This was also confirmed by Mr. Fives.

What evidence is there in the record in the case contrary to Mr. Pope's and Mr. Taylor's testimony relative to a full disclosure of facts to the prosecuting attorney? We submit there is none, and since there was no other or contradictory evidence the question of probable cause was one of law to be decided by the court and the motion for a directed verdict should have been granted.

The plaintiff in his brief, page 9, states that the memories of these witnesses were hazy as to the time the visits were made by Pope and Fives to Mr. Taylor. It is this matter of dates only that can in any way show even the slightest discrepancy in defendant's evidence. And the evidence of both Pope and Taylor are unequivocal that these documents were furnished by Pope and studied and fully understood by Mr. Taylor prior to Mr. Taylor's determination that there was probable cause and Mr. Pope's signing the complaint on the opinion and advice of Mr. Taylor.

Also plaintiff's brief attempts to draw some inference from the letter of A. W. Watson on probable cause, Exhibit 10, see page 10, plaintiff's brief, stating that he, Mr. Watson, was not furnished a copy of plaintiff's contract of employment and that therefore, Mr. Taylor was not furnished said copy, which is Exhibit I. Such inference is certainly not justified as it seems more logical to assume that Mr. Watson did not have a copy of the contract because Mr. Pope was taking said copy to Mr. Taylor. Furthermore, Mr. Taylor definitely states his opinion was formed as to probable cause from his own study of the information furnished him including the employment contract and not by anything stated in Exhibit 10. Also the inference that there was a deviation from said contract as urged by plaintiff's brief to the effect that plaintiff was not accountable for collections made

can not possibly be seriously considered in the light of plaintiff's testimony that he was short in his account and his setting forth such shortage in his final report, Exhibit 2.

Plaintiff's brief also states as a bare conclusion, without setting forth any evidence in support thereof, that Mr. Taylor did not have Exhibit I before him prior to arriving at his opinion and issuing complaint against the plaintiff. This assertion is directly contrary to the positive testimony of Messrs. Pope and Taylor.

Mr. Taylor's statement that he considered the cash bond and that it had no effect on his determination that the amount not accounted for by plaintiff was $70.00 or more and the bond could not be a setoff against this shortage, clearly proves that he had this document prior to issuance of the criminal complaint. So also is this true of the contract, because Mr. Taylor stated he had studied its provisions and discussed its terms with Mr. Pope prior to issuance of the complaint and even at the trial of the instant case remembered the paragraph discussed as to the provision for remittance by Cottrell. Against these positive statements the plaintiff's brief states that these documents were not received until after the issuance of the complaint without setting forth the evidence in support of said conclusion or inferences indulged in because of uncertainty as to dates of these conversations. Is it any wonder in light of this positive evidence, which

is uncontradicted by any other witness or testimony, that the trial judge held that the jury's answer to question numbered 2(a), 2(d), 2(f) and 2(h) and question No. 3 were not supported by the evidence.

Under such facts the cases are clear and virtually unanimous that the trial judge should render as a matter of law verdict in favor of defendants.

The following statement of the law found in Sec. 864 of 58 Am. Jur., Witness, is very persuasive as to how the courts consider evidence.

> "The general rule that the credibility of a witness is for the jury does not mean that the jury or the trial judge is at liberty under the guise of passing upon the credibility of a witness, to disregard his testimony when from no reasonable point of view is it open to doubt. The jury should not needlessly impute perjury to a witness.
>
> "It seems to be established as a general rule that when a disinterested witness, who is in no way discredited by other evidence, testifies as to a fact within his knowledge and which is not itself improbable, or in conflict with other evidence, the witness is to be believed, and especially where his testimony is fully cooperated."

The case of *Jerke v. Delmont State Bank,* (S.D.) 223 N.W. 585, 72 A.L.R. 7 at pages 16 and 17 of 72 A.L.R. after speaking of the functions of a jury states:

> "It is the theory of our law that the entire matter of a trial between parties shall be carried on in a court of justice and under the general

supervision and control of the judge thereof, and that the truth as to the facts shall be arrived at upon a consideration of the evidence and proofs presented by the respective parties in support of their respective claims. The jury, in modern law, is merely a part of the machinery of the court, and it is the part of such machinery that is made use of in proper cases for determining the truth as to the issuable facts. But we must not forget that the general superintendence and control of the court and all its machinery, including the jury, rests with the judge, and it is fundamental that an issue arising between litigants must be tried by a general, rational, or reasoning process, both as to the ascertaining of facts and the application of the law. This has been the basic theory of the common law ever since the rule of reason replaced trial by ordeal and wager of battle. The existence or nonexistence of ultimate issuable facts must be determined from the evidence produced in court, whether the determination is made by a judge or by a jury, by a process of rationalization and judgment, and by the application of the thinking faculties of the human mind to the evidence.

"We are too often prone to exaggerate the powers and privileges of a jury as a trier of facts. We frequently see the phrase, 'It is for the Jury to say what the facts are.' Historically speaking, this may have been true in the sixteenth century, but it has long since ceased to be true. The power and right and duty of the jury are not 'to *say* what the facts are,' but to adjudge and determine what the facts are by the usual and ordinary intellectual processes; that is, by applying the thinking faculties of their minds to the evidence received and the presumptions existing in the case, if any, and thereby forming an opinion or judgment. The

> data is the evidence received in court, and nothing extraneous thereto should enter into the determination, except to the extent that the sum of the past experiences of any individual always and necessarily, as a matter of psychology, enters into his formation of judgment or opinion based upon any given data. Before there is anything for submission to a jury, the evidence offered as to the ultimate facts must be such that the application of normal intellectual faculties thereto might by the customary and normal processes of reasoning arrive at different judgments or conclusions. If there is not such a state of facts a verdict should properly be directed, inasmuch as any result but one would not be a reasonable result, and the direction of a verdict in a proper case is not only the right of the judge, but it is his affirmative duty, and just as much and just as proper a part of his duty as ruling upon evidence or performing any other judicial function."

The plaintiff must prove in order to sustain his complaint of malicious prosecution the following: (1) the criminal prosecution of plaintiff, (2) its procurement by defendant, (3) its termination favorable to plaintiff, (4) lack of probable cause, (5) malice in the instigation of prosecution.

The defendants maintain very strenuously that the defendants acted honestly and in good faith and made a full and fair disclosure of all material facts known to them to the prosecuting attorney and that there was no dispute as to the facts and therefore the court should have directed a verdict for defendants.

On this phase of the law it is stated in 34 Am. Jur., Section 72, Malicious Prosecution, as follows:

> "It is established that if, in addition to his own belief, a defendant proves that before commencing prosecution of the criminal proceeding complained of he sought the legal advice of an officer selected by the people to prosecute offenders against laws, and in good faith fully and fairly disclosed to that officer all the information he possessed, and he was advised that a crime had been committed, the defendant has made out a complete defense to the action. This is true even though the advise may have been erroneous. It is sometimes held that advice from a public prosecuting officer makes a stronger case, and also, that such advice would be a complete defense when that of a private attorney would not. So, also, there is authority to the effect that the individual would be protected by the advice even though he may not have stated facts which he could have ascertained by reasonable diligence, the reason being that it is the duty of the public prosecutor to investigate charges of the commission of crime."

A very thorough and exhaustive treatise of this issue is given in 10 A.L.R. 2d 1215.

Also, the defendants urgently request the court to read the recent Idaho case of *Thomas v. Hinton,* 281 P. 2d 1050. This case gives a careful review as to when the court should decide the case. The facts are analogous to the instant case to a great extent. The trial judge failed to grant a motion for a directed verdict or for judgment

notwithstanding the verdict and the appellate court reversed, directing the trial court to enter judgment notwithstanding the verdict.

At P. 1054 the case states as follows:

> "* * * There being no dispute as to the facts, nor reasonable doubt concerning inferences drawn therefrom, the court properly entered judgment of nonsuit. (Cases)
>
> "The rule would seem to be quite general that in an action for malicious prosecution the question of whether or not there was probable cause is determinable by the court as a matter of law unless there is some evidence in dispute which requires submission to the jury. (Case.)"

The rule is, when defendant leaves the matter entirely to the judgment and responsibility of the prosecuting officer after a full, fair, and honest disclosure of the facts, he is not answerable in malicious prosecution, which rule is sustained by this court in following cases:

McKenzie v. Canning, 42 U. 529, 131 P. 1172;

Sweatman v. Linton, 66 U. 208, 241 P. 309;

Uhr v. Eaton, 95 U. 309, 80 P. 2d 925;

McCall v. Kendrick, 2 U. 2d 364, 274 P. 2d 962;

Thomas v. Frost, 83 U. 207, 27 P. 2d 459;

Kennedy v. Burbidge, 54 U. 497, 183 P. 325;

Singh v. Macdonald, 55 U. 54, 188 P. 631.

The anno. in 10 A.L.R. 2d at P. 1240 states:

> "But assuming, that in seeking advice of counsel, and in acting thereon, he has acted in good faith and has disclosed all the facts within his knowledge relating to the defense and the accusation, his defense of probable cause will be established even though the defendant should show at the trial other facts sufficient to secure his acquittal, which might have been ascertained by prosecuting witness, if he had made diligent inquiry therefor. It is not necessary that he shall institute an investigation of the crime itself, or seek to ascertain other facts relating to the offense, or to try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have come to his knowledge, for that would be to require him to perform the office of the committing magistrate; and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it."

Sweatman v. Linton, 66 U. 208, 241 P. 309 holds:

> "Our court is committed to the rule that a full and fair statement to prosecuting attorney and acting upon the advice of such attorney that there was probable cause is a complete and good defense to an action for malicious prosecution unless there is some particular evidence or circumstance, or facts, which would tend to show the defendant's disbelief in the fact that he had probable cause."

Elmer v. Chicago N.W.R., 51 N.W. 2d 707 (Wis.):

> "Criminal complaint signed by railway detective after being advised by district attorney

> upon sufficient evidence to issue complaint, the detective having made a full and complete statement of the facts within his knowledge, was based upon probable cause as a matter of law notwithstanding subsequent dismissal of criminal case."

In line with the law and the positive evidence in this case it is easy to see why the trial judge held as a matter of law that a full disclosure of all the material facts bearing on the prosecution was made by the defendants to Salt Lake County Attorney and that probable cause for the prosecution existed; and also the further finding in its opinion that the jury's answer on special verdict as to questions 2a, 2d, 2f, and 2h and question No. 3 are not supported by the evidence.

CONCLUSION

Accordingly, it is respectfully submitted that the findings of fact and judgment herein are supported by clear, positive and uncontradicted evidence, that a full disclosure of all material facts bearing on the prosecution was made by defendants to the county attorney and that probable cause for the prosecution existed, and the Findings of Fact and Judgment of the trial court should be sustained.

POINT II.

PLAINTIFF'S CASH BOND COULD NOT BE SET OFF AGAINST SHORTAGE IN HIS ACCOUNT.

The defendants are presenting argument under Point II in order to substantiate the Deputy County Attorney's opinion even though it is unnecessary to the decision in this case according to the authorities heretofore sighted.

Plaintiff's brief under sub-section (b) of Point I starting at Page 12 again asserts that Exhibit 4, plaintiff's cash bond, was delivered by Mr. Pope to Mr. Taylor sometime after December 7, 1953. No evidence is furnished to substantiate this statement and it is made by plaintiff even though both Messrs. Pope and Taylor stated that this document was delivered to Mr. Taylor, studied, explained and analyzed by him prior to a determination as to probable cause and the signing of the criminal complaint.

Also, Mr. Taylor in his answer to questions by the court (R. 158) set out herein stated: "that he did not think Mr. Cottrell could offset the moneys he collected under the terms of his contract against his bond, and, to that extent, and for that reason, I didn't consider the amount of the bond particularly important, and don't recall exactly what the amounts were. But I do recall we had a discussion about them, and I knew he had an amount of money on deposit." That this statement and opinion is a correct statement of the law is shown by the following citation:

20 Corpus Juris, Embezzlement, Sections 50 and 51 hold:

> Sec. 50 — "The fact that the embezzler offers to return or does return what he has fraudulently converted, or that he or his sureties settled with the owner, does not bar prosecution for embezzlement, the offense being complete at the time of conversion."
>
> Sec. 51 — "The fact that a defendant has given an indemnity bond is no defense to the prosecution for embezzlement, nor would it seem, is he *entitled to have it* taken into consideration in mitigation of his punishment."

To the same effect is Section 56 of 18 Am. Jur., Embezzlement, which holds:

> "It is no defense to embezzler that funds were appropriated in good faith under the belief that the owner was indebted to embezzler in an amount equal to or greater than, the amount taken.
>
> "The offense is not condoned by giving collateral security."

Also the following cases:

> "When principal intrusted property to his agent for a particular purpose and agent embezzled it, a subsequent offer of agreement to make restitution did not defeat a prosecution for embezzlement." (*Jorgensen v. State,* 283 N.W., 537 Neb.)

"One may convert money of another to his own use by paying it out on his private or personal debts, and the subsequent restoration of the fund embezzled, or the payment of the shortage does not expunge or conclusively contradict the guilt of one who had completed the embezzlement." (*McGreever v. State,* 300 N.W. 485, Wis.)

Respectfully submitted,

CRITCHLOW, WATSON & WARNOCK

Counsel for Respondents

1320 Continental Bank Building
Salt Lake City, Utah